United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

orig affidavit of Walker

77-1176

To be argued by
GAVIN W. SCOTTI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1176

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

DAVID WALKER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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FOR THE SECOND CIRCUIT

Docket No. 77-1176

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID WALKER,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Appellant David Walker appeals from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, J.) convicting him, after a jury trial, of violations of embezzlement from the mails and conspiracy. Appellant was charged in a two-count indictment along with Helen Helton and Rosario Marchione with embezzling twelve parcels of mail while employed as a postal employee which had come into his possession intended to be conveyed by mail, in violation of Title 18, United States Code, § 1709, and with conspiracy to embezzle mail in violation of Title 18, United States Code, § 371.*

* Helen Helton and Rosario Marchione pleaded guilty to the conspiracy charge and both testified for the government at trial.

David Walker was sentenced to concurrent terms of imprisonment of three years and consecutive fines of $2,000 and $10,000 respectively on Counts One and Two of the indictment. Walker is currently free on bail pending appeal.

Appellant urges as grounds for reversal of his conviction, the alleged suppression of exculpatory evidence and failure to turn over the grand jury testimony of a postal inspector by the government. Counsel for appellant further asserts that a reversal is required because of error committed by the trial judge in admitting into evidence proof of large cash expenditures by Walker after the embezzlement and the testimony of a postal employee who was solicited by Walker to participate in the crime prior to its occurrence.

Statement of Facts

The Government's Case

Introduction *

The Government's proof was presented in the main through the testimony of appellant's two accomplices Helen Helton and Rosario Marchione. Like appellant, both accomplices were postal employees assigned to the Airport Mail Facility, John F. Kennedy International Airport, Building 179 (hereinafter called AMF). In addition to the accomplices' testimony, other Government witnesses testified about their conversations and transactions with appellant which provided circumstantial evidence from which the jury could infer guilt.

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* Numbers in parentheses refer to trial transcript pages "T." or Government's Appendix "A." References to the Sentencing Minutes of March 11, 1977 will be so designated.

Helen Helton testified that she began working as a Clerk at the AMF in November of 1973, where she met David Walker who was a supervisor (T. 113).* In a few months, Helen Helton and David Walker became lovers (T. 114). During this period of time Rosario Marchione was also employed at the AMF as a Transfer Clerk who was often supervised by Walker. In February or March of 1975, Walker terminated his affair with Helton, but they both continued to work together at the AMF.

The Conspiracy

Helton testified that sometime toward the end of August, 1975, appellant presented himself at her home and asked to be taken back stating that he "realized what he had." Helton readily resumed her prior intimate relationship with him (T. 114-5). Shortly thereafter, according to Helton, at various times when they were alone, Walker explained to her how easy it would be to steal mail from Registry Section where Helton worked and for her to be a part of it. Helton testified that she went along with Walker's proposed theft of mail giving the impression that she would help him. Helton was motivated by her love for Walker and her desire to maintain their relationship (T. 124-7).

Apparently confident of securing the aid of Helen Helton, Walker simultaneously, in early September 1975, had a conversation with Anthony Short (T. 49). Short was employed by the Postal Service as a Ramp Assistant Clerk at the time and his duties included carrying mail in a jeep from the AMF to various airlines for delivery (T. 46). During this initial conversation, after confirming that Short's duties required him to drive on public roads around the Airport, Walker asked if Short would

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* David Walker's salary in September of 1975 was $17,129 per annum (T. 494).

be willing to take a bag of mail out of the Airport and deliver it to Walker at a prearranged location. Walker further told Short that in return for these services Short would receive $100,000 (T. 51-2).

Later that morning, Short telephoned Walker and recorded the conversation (T. 53-4; Government Exhibit 4). During this conversation, Walker outlined his entire scheme to embezzle mail from the Registry Section. Walker told Short: that he would have to take one sack of mail out of the Airport; that if Short were stopped to use the excuse that he was making a delivery to an airline; that Short would get at least $100,000 in two days after the theft; that only Walker would know who else was involved because "this is, something that is sort of big, pretty big and it could come off big, but ah, I'm not, you know, as far as this person, they could never put the finger on you and I want to make sure you could never put the finger on the person" (A. 5); that once they got the mail sack out Walker wasn't worried because the inspectors would be looking for suspects inside the Registry Section and even if he were questioned he would "deny everything anyway" (A. 8); and that Walker didn't know exactly when the theft would take place because "it's gonna have to be the right time" (A. 2).

Subsequent to this conversation, Anthony Short met on September 7, 1975 with Postal Inspectors, gave them a copy of the tape he had made and told them of his conversations with Walker (T. 70). Thereafter, with the knowledge of the Postal Inspectors, Short met with Walker and a suitable place was selected near the Airport for Short to give the mail bag to Walker (T. 72-3).

Meanwhile, Walker was also instructing Helen Helton to make up a mail sack, put it in a cart, wheel it out of the Registry Section, and leave it for him (T. 129-30). Walker also instructed Helton not to lock the sack with the required rotary lock (T. 140), but to use a conventional lock to facilitate the removal of the mail sack un-

noticed (T. 243). Also, while working at the AMF, Walker who was supervising the area directly adjacent to the Registry Section, on two occasions prior to September 22, asked Helton if she "had anything".* Helton testified that she understood this to mean if she could get a bag together, but that she would always reply in the negative because she hoped ~~the~~ the theft "would never take place" (T. 132).

The Embezzlement

On September 22, 1975, David Walker was assigned to replace the supervisor of the Registry Section who was ill. Sometime after 5:00 A.M., Walker asked Helton if she had "heart" (T. 134). Helton testified that she knew this to mean that she was to make up a bag of mail from the area known as the "valuable cage" for Walker to steal (T. 135). Helton went to the valuable cage which was located within the Registry Section (T. 116) and signed out for the twelve parcels of mail in question. Helton testified that she was not positive of the contents of the twelve parcels, but from their markings and tags she knew they were being sent from banks in Milan, Italy and Grenada, British West Indies to banks in New York. She further described the ten parcels from Italy as each being wrapped in a canvas "money type sack you see in banks". Helton explained that from their appearance there was a "good chance" that these parcels contained something valuable such as cash (T. 177 -183, 211, 218). After obtaining the 12 parcels Helton placed them in a canvas mail bag (T. 135-6), filled out a manifold bill, in triplicate, listing the parcels in the bag and reflecting a rotary lock number as being affixed to the bag (T. 135-6, 138). The rotary lock, however, was not placed on

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* Walker, Helton and Marchione worked on Tour 1 from midnight to 8:00 A.M.

the bag, as per Walker's instructions (T. 140). Helton took the rotary lock home with her and gave it to Walker who later threw it in a river (T. 120-21, 146-7). Helton testified that she gave a copy of the manifold bill to the person in the valuable cage. She also explained that she refused to place the canvas bag she had just prepared onto the skid which Walker had indicated because that skid already contained blue nylon bags and she would never mix a canvas bag with nylon bags * (T. 142). Helton placed the canvas bag on the floor beside her, nodded to Walker with her eyes "letting him know that this is what I had made up for removal" and turned her back and went about her regular duties. She then went home at approximately 8:30 A.M. (T. 142).

Earlier that morning between 4:00 A.M. and 5:00 A.M., Walker had gone upstairs in the AMF to the lunchroom and spoke to Rosario Marchione (T. 313). Walker asked Marchione "do you have balls". Marchione replied "yes", and Walker told him that a bag had come in on the prior tour which was going from Miami to the British West Indies. Walker then directed Marchione to "go downstairs" (T. 316).

A short time after Marchione arrived on the first floor, he observed Walker coming out of the Registry Section pushing a skid in front of him and pulling a second behind him. Without any conversation, Marchione went directly to Walker's assistance and pushed the second skid out onto the new flight deck following Walker (T. 318-9). Walker pushed his skid up to a tractor trailer truck which was backed up to the deck with the rear door open (T. 321). Marchione then helped Walker unload empty blue bags from the skid into the truck

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* A skid is a flat piece of wood with wheels and a frame used to move mail.

which was also empty (T. 322-3).* While off loading the skid, Marchione felt a canvas bag and the corner of what felt like a box inside the canvas bag. This canvas bag was covered by a blue nylon bag. Marchione testified that as soon as this canvas bag was thrown into the truck he heard the sound of metal hitting metal. Walker then told Marchione to have another postal employee move the truck leaving the remaining blue nylon sacks on the skid. Following Walker's instructions, Marchione directed an employee to move the truck (T. 325-7).**.

A short while later, Walker told Marchione to take the "equipment" off the trailer. Marchione told Walker "it was heavy" to which Walker replied that "he almost got a hernia throwing it over the fence" (T. 328).*** Marchione proceeded back to the deck with a driver and observed the truck backed against a fence separating the AMF from the public roadway area and entrance to the employee parking lot (T. 328-329, Exhibit 15). The tractor trailer was backed up to the deck and Marchione unloaded the same blue nylon bags. There was no canvas bag in the truck. Marchione advised Walker that the sacks were off the truck and Walker said he would call Marchione (T. 332-33).

Later that morning, pursuant to a phone call from Walker, Marchione met him (Walker) at 225th Street and South Conduit Avenue in Queens, New York (T. 333-34). As Marchione entered Walker's automobile, Walker handed him a drink and said that "he made the big one" and that Marchione and another person were

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* Marchione testified that normally such a truck should not have been backed up against the deck at that time (T. 322).

** This employee apparently knew where to move the truck (T. 326-27).

*** The supervisors parking area was directly adjacent to the parked truck inside this fence (Tr. 330-31).

getting $30,000. Walker refused to tell Marchione who the other person was stating "[i]t's best you don't know" (T. 334). Walker gave Marchione a paper bag filled with money and told him not to worry, reiterating that the bag was going from Miami to the British West Indies. Walker further told Marchione that if the Postal Inspectors do not "catch you with your hand in the till they don't have anything" (T. 335). The next night Walker told Marchione to burn the rubber bands and wrappers on the money and stated that he had thrown the "sack and everything off a bridge" (T. 341-42).

When Marchione counted the money he came upon a bundle with an attached piece of paper that was marked "Attention, Chief Teller, 1 Chase Manhattan Plaza" and also realized that he only had $22,000 (T. 337-9). After an abortive attempt to return the money to Walker, (T. 338) Marchione decided to keep it and a few days later told Walker that he had only received $22,000. Walker subsequently met Marchione at a diner and gave him an additional $8,000 * (T. 339). Marchione then confronted Walker with the fact that a paper addressed to the Chief Teller, 1 Chase Manhattan Plaza was included in the money. Walker stated "[d]on't worry about it, its nothing" (T. 340) and. after repeated questioning by Marchione, stated:

> Look I don't want to hear. I'm trying to block this out of my mind . . . I look in the mirror and I practice yoga and I can wipe it out of my mind (T. 341).

While the preceding scenario unfolded, Walker was simultaneously involved in distributing to Helen Helton

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* Marchione testified that he squandered about $2[illegible]00 gambling. Prior to the trial he returned $2,000 to the Government (T. 350).

her share of the proceeds. During the afternoon of September 22, 1975, after r ing Marchione, Walker went to Helton's home and p ited her with a bag of money. She and Walker then opened the bag and Helton saw a quantity of money in bundles of various denominations. Pursuant to Walker's instructions, Helton burned the wrappers on the money. She then hid the money first at her friend's home, then in safe deposit boxes owned jointly with her friend, and finding this unsatisfactory, finally went with Walker to a house he owned in Granville, New York where they buried the money in early October (T. 143-151).*

In November of 1975 Walker bought Helton a small diamond ring (T. 153). In December of 1975, Walker gave Helton additional cash to buy a mink coat for a Christmas gift (T. 515). The couple went to Las Vegas in January 1976, and Walker gave Helton more cash to buy a fur jacket. This coat and jacket ultimately cost $5,200 (T. 515-53).

Walker, however, did not deny himself. In early January, 1976, Walker purchased a group of garden apartments for $500,000. He came to the closing with $100,000 in cash in an attache case which the mortgagee required to be converted to a check (T. 287-95, Exhibit 12). During early February, Walker purchased a Jaguar XJ6 automobile with approximately $15,000 in cash (T. 351-55). Later that same month, Walker aided Helton in the selection of a Thunderbird automobile and loaned her $5,000 in cash toward the purchase price (T. 154-55, 300-307).**

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* It is estimated that Walker gave Helton approximately $200,000 on September 22nd. Helton returned $144,450 (T. 163, 495) and testified that: she spent about $2,000 (T. 162); she gave her friend approximately $2,500 (T. 147); and Walker took about $40,000 from her share in May of 1976 (T. 159).

** Walker paid the salesman in cash (T. 304).

In March of 1976, Helton was interviewed by postal inspectors regarding the disappearance of the twelve parcels of mail in question from the Registry Section, and lied in her responses to their questions (T. 155-57). Subsequent to this interview, Walker told Helton not to worry and that if the inspectors didn't find any money Helton would not be held for the crime (T. 157-58).

In May of 1976, Walker told Helton he needed $40,000. Thus on May 17, 1976, Walker and Helton drove to Granville, New York, dug up the money, Walker took $40,000 and gave the rest to Helton (T. 159-60, 476-83).

Seven days later, Helen Helton was arrested and soon thereafter agreed to cooperate with the Government. On May 28, 1976, Helton turned over $144,450 of the cash which she had originally received in September of 1975 from David Walker (T. 158-59, 163-64, 495).

The defendant did not take the witness stand. However, over the Government's objection defense counsel, without producing any witnesses, was permitted to introduce several bank books and deeds for property which reflected amounts of money and property held in the defendant's name prior to the date of the embezzlement (T. 377-90, 512-13).

Proceedings During Jury Deliberations

After the jury had begun its deliberations, the prosecutor advised counsel for the defense that the prior grand jury testimony of Postal Inspector Mullins had not been provided at the completion of his direct trial testimony. A copy of these minutes was given to defense counsel, who moved for a dismissal of the indictment and a mistrial (T. 630-31). Inspector Mullins was then examined by defense counsel to demonstrate to the Court what testi-

mony he would have elicited from the witness had he been given Inspector Mullins' grand jury testimony prior to cross-examination (T. 357-361 compared with T. 639-43, 655-74, 677-86). The trial judge made specific findings regarding each area pursued by defense counsel as follows:

1. Cross examination on the duration of the surveillance of Walker would only affect the credibility of the witness and would have had no "substantial significance of any kind with respect to guilt or innocence" (T. 640).

2. Inquiry as to whether the parcels from Italy were registered or insured and if that made any difference was explained by the witness. As of November, 1974 all insured parcels from Italy were treated as registered parcels by order of the Postal Service. Counsel was provided with a copy of this order prior to trial. Counsel told the Court he had contrary information, but never stated its nature and abandoned the point (T. 640-43, 655-58).

3. The time when the ten parcels from Italy entered the valuable cage and the time Walker went to lunch had "[n]othing to do with anything, with any point in the case" (T. 658-663).*

4. Mullins' grand jury testimony regarding the rotary lock was "exactly confirmatory of Mrs. Helton's testimony" (T. 663-64). "This is exactly confirmatory of the Government's case. I don't see how you would gain anything" (T. 664-66).

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* It must be noted that during his argument to the Court, defense counsel assumed that Walker had personally punched a time card at 4:30 A.M., indicating he was going to lunch. This was not the case. Someone else made the time rings for Walker at a later time based on a form filled out by Walker (T. 280-81).

5. With regard to whether defense counsel would have elicited from the witness that Walker paid $11,000 cash for Pan American stock after the embezzlement, the Court stated, "I can't believe you would have done skillfully [*sic*] as you are, but go ahead" (T. 667-69).

6. The fact that Mullins testified before the grand jury that according to hearsay, Walker had "dumped a pile of cash" on the table at the closing for his apartments when Mr. Kershaw testified at trial that Walker produced the cash in a briefcase was "all adverse to your [defense counsel's] client" (T. 669-70).

7. The fact that Inspector Mullins did not state before the grand jury that Walker went to the bank with other people to exchange $100,000 for a bank check was "irrelevant" (T. 671-72).

Judge Weinstein, thereafter stated that: "I find beyond a reasonable doubt that this information could not have affected the verdict except to make a verdict of guilty more probable" (T. 680-81).

Defense counsel then brought out that Mullins' grand jury minutes reflected that while Walker was at the bank exchanging his $100,000 for a bank check he filled out an Internal Revenue Service form evidencing the exchange. Counsel stated he would have "certainly gone into that" (T. 673).

The court then asked why this form was not produced "as Brady material" (T. 673, Exhibit 19) and the prosecutor responded that the defendant had put the wrong social security number on the form. Turning to defense counsel, the Court then stated,

> All right. You would have opened the door to that and it would have been absolutely murderous (T. 674).

Judge Weinstein stated that the last digit of the social security number written on the I.R.S. form was a five and not a seven. However, he also held that this fact did not "take it [the I.R.S. form] out of Brady. It should have been turned over" (T. 678) and in response to the prosecutor's statement that, "I don't see how it's the [*sic*] Brady. I don't see how it exculpates this defendant". Judge Weinstein stated, "I believe it does" (T. 681).

At the prosecutor's urging, defense counsel stated that he knew from his client "that forms were executed. And I think I asked Mr. Kershaw—it was something given to the Government. I asked Mr. Walker, did you have to sign anything down at the bank. I believe I was told that he did sign some papers. That was the basis of my question" (T. 683). Counsel further stated that he was not sure if he knew specifically that an I.R.S. form had been executed (T. 683). Judge Weinstein then stated, twice, that the I.R.S. form was "so detrimental to the defendant that I can't say that a violation of the Brady rule warrants a mistrial" (T. 683-84). After the jury had rendered its verdict, the Judge made the following finding:

> I have carefully reconsidered the Brday argument and I find it without any substance at all. I believe beyond any reasonable doubt that it would not have any impact at all on this verdict (T. 699).

Judge Weinstein reiterated this finding and his prior rulings regarding the grand jury testimony of Inspector Mullins at the sentencing of the defendant Walker (T. March 11, 1977 pp. 4-17).

In addition, the prosecutor advised the Court that defense counsel had, prior to trial, been provided with letters detailing extensive discovery material including

the names, addresses and phone numbers of all personnel on duty at the Registry Section on September 22, 1975. Defense counsel acknowledged receipt of these letters and Judge Weinstein made a finding that the prosecutor's failure to turn over the grand jury testimony and I.R.S. form to defense counsel was a "negligent failure" and not an "intentional failure" (Sentencing Minutes, March 11, 1977, p. 17).

ARGUMENT

POINT I

The Defendant Walker Is Not Entitled To A Dismissal Of The Indictment And Was Not Denied A Fair Trial.

Appellant alleges two related grounds as the predicate for justifying a dismissal of the indictment or a reversal of his conviction.* In one argument, he asserts that the failure of the Government to provide the grand jury minutes of Inspector Mullins, absent a demand for same, mandates a dismissal of the indictment and in another point claims that the new disclosure of alleged *Brady*** material warrants a reversal of conviction.

A. Grand Jury Minutes

Appellant claims that had he been armed with the grand jury testimony of Inspector Mullins he would have been able to induce a reasonable doubt in the mind of the jury. Such a claim of "what I could have done" is commonplace in these instances by defense counsel. How-

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* The Government will respond to Appellant's points one and two in reverse order for the sake of continuity.

** *Brady* v. *Maryland*, 373 U.S. 83 (1963).

ever, it is respectfully submitted that prior to reaching the question whether the mere failure to turn over the grand jury minutes requires reversal, a determination must be made whether, absent defense request, the material must, in any event, be produced under 18 U.S.C. § 3500.

Section 3500(b) provides, in pertinent part:

> After a witness called by the United States has testified on direct examination, the Court shall, *on motion of the defendant*, order the United States to produce any statement . . . . (*emphasis added*)

Thus, we submit, that it is evident from the language of this section, that it is the request that triggers the Government's obligation. Here Judge Weinstein found, that "[n]o such motion was made" (Sentencing Minutes, March 11, 1977, p. 12).* Accordingly, it is submitted that the failure of the Government to turn over Mullins' grand jury minutes in the absence of a defense request was not error.

Section 3500(b) further provides that the material which must be produced subsequent to such a motion must relate "to the subject matter as to which the witness had testified".

In this connection, Judge Weinstein recognized that the Government's direct examination of Mullins was extremely limited at the specific direction of the court (T. 358-60). He then found that "[n]one of the material which the defendant said should have been turned over to

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* Judge Weinstein however, did comment, "in defense of defense counsel", that counsel was "probably justified" in not making a specific demand since other material had been provided voluntarily (Sentencing Minutes, March 11, 1977, pp. 15-16).

him pertained to what Inspector Mullins said in direct examination" (Sentencing Minutes, March 11, 1977, p. 12). In addition, the areas which defense counsel stated he would have explored on cross-examination, had he received the grand jury minutes, should have been precluded by Rule 611(b), Fed. R. Evid., which limits such questioning to matters testified to on direct examination or matters affecting the credibility of the witness. Alternatively, as was the situation, defense counsel could and did ignore the direct testimony of Mullins and examined him as a defense witness (T. 363). Because of this conversion of Mullins to a defense witness, Judge Weinstein properly found that defense counsel "forewent the benefits of Section 3500" (Sentencing Minutes, March 11, 1977, pp. 12-13).

Thus, defense counsel was not entitled to the subject grand jury minutes and the failure of the Government to provide them was not error and certainly not error which would warrant a reversal. *United States* v. *Andrews*, 381 F.2d 377, 378 (2d Cir. 1967). Interestingly, however, appellant seeks not reversal of his conviction but dismissal of the indictment and for this claimed relief there is simply no authority and appellant does not cite to any authorities.

Assuming, however, that the failure to request these minutes is not a bar to this claim, there was still no error. The cases cited by appellant are inapposite. In *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir. 1973), *cert. denied sub nom. Gomez* v. *United States*, 414 U.S. 1070 (1973) quoted at length by appellant, this Court held that, if requested, the grand jury testimony of a policeman would have been available to the defendant for impeachment by contradiction of trial witnesses who did not testify in the grand jury. This Court further held that since "no request for such an examination on this ground was made below, Ramirez cannot raise the

point now" at p. 813. *Alford* v. *United States*, 282 U.S. 687 (1931), also cited extensively by appellant, predates Section 3500 and is inapposite.

The applicable test was stated in *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), where the Government failed to produce "significant" 3500 material of a key witness. This Court held, quoting *United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969), that the standard is: " 'was [there] a significant chance that this added item, developed by skilled counsel . . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' " Under this standard, reversal was required only as to those counts where there was no other evidence of guilt produced except the testimony of the key witness, and where the other independent or corroborative evidence was not sufficient, standing alone, to justify a conviction. See also *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States* v. *Gugliaro*, 501 F.2d 68 (2d Cir. 1974).

Applying *Sperling*, nothing raised by appellant can reasonably be said to have induced a reasonable doubt to avoid conviction. For example, regarding the time that Walker went to lunch, appellant very carefully states that the records of the post office "reveal that Walker had gone to lunch between 4:00-4:30 A.M." (Appellant's brief at 14). He then takes two pages to reconstruct an argument based on this premise and Mullins' grand jury testimony that the ten parcels from Italy came to rest in the Registry Room at 4:30 A.M. Counsel neglects, however, to state that Mr. Alfred Spampinato, a Data Systems Officer at the AMF, explained that on the day in question, Walker did not punch his own time rings. In fact, Spampinato testified that someone else made the time punch notations for

Walker based on a form that Walked himself filled out. Moreover, Mullins testified, in the grand jury, that the parcels from Italy were received in the vault room of the Registry Section at 4:30 A.M. Mullins did not testify as to the time the parcels entered the Registry Section which Walker was supervising. In any event, regardless of the time, the manifold bill and the vault book (Gov. Ex. Nos. 6 and 7; A. 10-11) establish that Helton took these parcels. Finally, appellant conveniently fails to note that the identical argument he now claims he would have made was, in fact, made by him during summation (T. 544-46).

Counsel next urges that Mullins' grand jury testimony would have permitted an argument that the parcels from Italy were not handled by Helton because they were insured and not registered. Therefore, so he claims the argument would run, Helton could never have received them. Counsel further implies that the first time he learned of a Mrs. Samuels, who was the postal employee assigned to open insured mail, was during the examination of Inspector Mullins with respect to his grand jury testimony. Thus he claims that although he would have called Mrs. Samuels it was too late since the jury was deliberating. This argument is specious.

Included in a discovery letter, dated November 8, 1976 (A. 12), was a detailed account of how these parcels arrived at the AMF and the names of all the employees who handled the parcels and a description of what they did with the parcels. Among these names were E. Samuels, identified as the person who opened the dispatch containing the parcels, and G. Horowitz, identified as the person who signed the parcels into the valuable cage, which entry was co-signed by E. Samuels. A second discovery letter, dated November 24, 1976 (A. 20), contained a list of all employees' names, addresses and

phone numbers, where available, who were assigned to work in the Registry Section on September 22, 1975, (the date of the theft). Defense counsel acknowledged receipt of these letters (Sentencing Minutes, March 11, 1977, p. 17). A third discovery letter, dated December 23, 1976, contained a copy of a post office logistics order which mandated that all insured mail from Italy and several other countries be treated as registered mail (T. 642-43). Additionally, the defense subpoenaed Mrs. Horowitz for the trial but did not call her as a witness. (Sentencing Minutes, March 11, 1977, p. 16).

This latter fact demonstrates that defense counsel was well aware of the information contained in Inspector Mullins' grand jury testimony long before the jury retired to deliberate. Appellant could have called any of the employees whose names were furnished to him prior to trial if he seriously wanted to establish the points he now raises on this appeal, including whether Helton actually handled these parcels. Of course, the documentary evidence introduced proved that Helton testified truthfully concerning receipt of the parcels. Therefore, Judge Weinstein's finding, made prior to verdict, is understandable:

> I find beyond a reasonable doubt that this information could not have affected the verdict except to make a verdict of guilty more probable (T. 680-81; See also Sentencing Minutes, March 11, 1977, p. 13).

B. The IRS Form

Appellant also claims that production of the grand jury minutes would have made him aware of an IRS form (Exhibit 19) executed when Walker exchanged his $100,000 in cash for a bank check. So the argument goes, he would have then stressed to the jury that

Walker's reporting of this money exchange to the IRS manifested a lack of consciousness of guilt. Accordingly, he argues that failure to supply this form, which he contends was *Brady* material, denied him a fair trial dictating a reversal of conviction.

The circumstances concerning the alleged discovery of this form by defense counsel were fully set forth above in the statement of facts and will not be repeated here. However, it is submitted that, before it can be concluded that the IRS form was exculpatory material, this evidence must be evaluated to determine if, in fact, this is so. The form reflects that the last digit of the defendant's social security number was incorrectly written as a "5" instead of a "7" (T. 677, 684). The defendant demonstrated in court that he could recite his social security number from memory (T. 677). Therefore the form would have served only to corroborate the government's proof that this money exchange had been made in the open presence of others. On the other hand, if the form had been admitted into evidence, the erroneous social security number would have provided evidence from which the Government could argue that Walker had attempted to conceal his identity at the bank. As Judge Weinstein observed, a "computer has no imagination, and it would not have turned up the defendant's name if the social security number, as written, was fed into it" (Sentencing Minutes, March 11, 1977, p. 9).

The Court immediately recognized that this form would have been "murderous" to the defense (T. 674) but then strangely stated that the form may tend to exculpate the defendant (T. 681) even though he later concluded that regardless of whether there was a violation of *Brady*, the IRS form was "so detrimental that it really doesn't make any difference" (T. 683-84). Thereafter, the jury verdict was returned following which

Judge Weinstein, upon careful reconsideration, found the so-called *Brady* issue to be "without any substance at all" (T. 699).

It should be noted that even though counsel did not have this form, he argued in summation that the openness with which Walker bought the apartments and exchanged cash for a bank check demonstrated that he was innocent (T. 555-60). But, in any event, the existence of this IRS form was equally, if not more so, available to the defense then to the Government. Defense counsel conceded that he knew of the money exchange at the bank and knew that documents had been executed at the bank (T. 683). Although counsel later disclaimed knowledge of the bank transactions, Judge Weinstein did not credit this disclaimer, and found that the entire incident was known to the defense and could have easily been discovered with due diligence (Sentencing Minutes, March 11, 1977, pp. 5-7). See *United States* v. *Natelli*, Dkt. No. 76-1494, Slip op. 2557, 2560 (2d Cir., March 28, 1977). Judge Weinstein also observed that, with respect to the IRS form, he did not "see any neglect on the part of the government" (Sentencing Minutes, March 11, 1977, p. 7). Moreover, he noted that "it is doubtful that this was *Brady* material . . . [and] [i]n any event, this evidence was merely cumulative" (Sentencing Minutes, March 11, 1977, p. 9).

In *United States* v. *Ruggiero*, 472 F.2d 599, 603-605 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973), this Court made it clear that *Brady* did not apply to situations where the non-disclosed material was equally, if not more so, available to the defense as to the government. See also *United States* v. *Brawer*, 367 F. Supp. 156, 173 (S.D.N.Y. 1973), *affd.* 496 F.2d 703 (2d Cir. 1974), *cert. deneid*, 419 U.S. 1051 (1974). Therefore, it is submitted that the IRS form did not constitute *Brady*

material. However, even if this Court were to hold otherwise, the relief sought by appellant would not be warranted. A fair reading of the record amply demonstrates that this IRS form did not rise to the level of "significance" or "high value" that would have altered the verdict. *United States* v. *Agurs*, 427 U.S. 97 (1976). Also, as Judge Weinstein noted, the evidence in the case was overwhelming (T. 499-500, 512). This fact, coupled with the Court's observation that there was no neglect by the Government regarding the IRS form, requires that appellant's argument be rejected.

Counsel's attempt to show that a demand was made for the IRS form (Appellant's brief, p. 5) is simply unpersuasive for he misquotes the record, which instead reflects that counsel was seeking bank account information regarding Walker's assets (T. 397-400). Summary sheets of the Government's investigation were inspected by the Court and were determined to be "work product information otherwise available to the defendant" and hence, were not required to be turned over (T. 400). Appellant, therefore, can hardly claim that the prosecutor should have realized that he was seeking the IRS form from a bank in which Walker merely exchanged cash for a bank check. *Untied States* v. *Brawer*, *supra* at p. 171.

Further, appellant's attempt to establish the materiality of the IRS form through the *ex parte* interview of jurors directly violates Rule 606(b), Fed. R. Evid., as well as the long standing rule of this Court. *United States* v. *Green*, 523 F.2d 229 (2d Cir. 1975), *cert. denied*, 424 U.S. 1074 (1976); *United States* v. *Brasco*, 385 F. Supp. 966 (S.D.N.Y. 1974), *affd.* 516 F.2d 816 (2d Cir. 1975), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967), reversed on other grounds, 399 F.2d 135 (2d Cir. 1968); *United States* v. *Gricco*, 261 F.2d 414 (2d Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). Therefore, this information should not be permitted to buttress appellant's argument.

POINT II

Proof Of Large Cash Disbursements By The Defendant After The Theft Was Properly Admitted Into Evidence.

Appellant claims that the court erred in admitting evidence of large cash disbursements made by the defendant after the theft. The claim is that this evidence impermissibly shifted the burden of proof to the defendant and would have required him to testify in order to properly rebut the evidence (Appellant's brief, p. 22, n.*). This claim is frivolous.

The relevancy of the evidence that Walker, who was earning approximately $17,000 in September of 1975, doled out approximately $355,200 in cash from September of 1975 to February of 1976, is clear: proof of a change in lifestyle and possession of large amounts of money after a theft by a person of modest background is relevant circumstantial evidence from which the jury could properly infer that, coupled with the other proof adduced at trial, the defendant was guilty as charged. *United States* v. *Schwartz*, 535 F.2d 160 (2d Cir. 1976). Indeed, the court below specifically determined this evidence to be relevant (T. 16-17).

Appellant nevertheless claims that there was no evidence as to what was contained in the stolen parcels. This is not correct. Helton described the parcels as money type sacks sent from foreign banks to banks in New York (T. 117-183). Marchione testified that mixed in with the money he received from Walker was a notice to the Chief Teller, 1 Chase Manhattan Plaza (T. 137). Both Helton and Marchione testified that Walker told them he had destroyed the wrappers on the money and the "sack and everything" (T. 146, 341-42) and, at Walker's direction, each destroyed the wrappers on the

money each had received from Walker. Moreover, Helton's testimony that she and Walker buried her share of the money behind Walker's upstate cabin was corroborated by Inspector O'Brien who discovered the burial site (T. 159-60, 476-83). All of this evidence, coupled with Walker's disbursement of well over $200,000 in cash to Helton and Marchione, hours after the theft and his subsequent large cash expenditures, we contend, established that money was contained in the parcels that were stolen.

Appellant's citations support admission of the evidence. Indeed, *United States* v. *Marx*, 485 F.2d 1179, 1183 (10th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974), held the admission of money found in the defendant's possession to be proper on relevancy grounds. The Court further stated, "[f]or . . . [the money] to be admitted, all that is required is that it have enough rational connection with the isssues to be considered a factor contributing to the deciding of the issues" at page 1183. Clearly such is the case here. In *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir. 1970), *cert. denied* 400 U.S. 834 (1970), this Court, in a similar holding noted that the trial judge's determination of relevancy will rarely be disturbed on appeal.

Appellant's claim that the burden of proof was improperly shifted to him is meritless. First, the admission of evidence against a defendant always is prejudicial to the interests of the defendant but that, standing alone, does not shift the burden. The relevant inquiry is whether the probative value was outweighed by unfair prejudice, Rule 403, Fed. R. Evid. We submit that the evidence was not unduly prejudicial. In any event, the defendant was permitted to put into evidence bank books and deeds to properties, which were owned by him prior to the date of the theft to rebut this proof. Moreover, Judge Weinstein specifically stated that he would not

require the defendant to testify for that purpose and permitted this evidence to be introduced without the requirement of calling any witnesses (T. 378).

Despite this, appellant's claim appears to be that along with the introduction of evidence of large cash expenditures the Government was also required to negate possible legitimate sources from which the money for these expenditures was derived. The Government however is not held to such a requirement. As far back as 1939, this Court, in *United States* v. *Jackskion*, 102 F.2d 683, 684 (2d Cir. 1939), *cert. denied*, 307 U.S. 635, clearly held that in crimes where pecuniary gain is the motive, "evidence of the sudden acquisition of money by the defendant is admissible even though the source of the money is not traced." More recently in *United States* v. *Hinton*, 343 F.2d 1002, 1013 (2d Cir. 1976), in a different, however we submit analogous context, this Court suggested that where large cash expenditures are shown, a defendant is, of course, "free to rebut this evidence" but did not suggest that there had been a shift in the burden of proof. An argument strikingly similar to appellant's was rejected in *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973) (*rev'd. on other grounds*). In *Falley*, *supra* at pages 38-40 this Court discussed the rationale and propriety of the introduction of cash expenditures as circumstantial evidence of guilt in cases involving crimes primarily motivated by financial gain. After recognizing the inherent necessity of establishing a prior net worth or impecunity in criminal tax cases, the Court reiterated the widely accepted view that such proof is not required in non-tax cases as a precondition to the admission of evidence of either the possession or expenditure of large amounts of cash, stating that: "Lack of proof of prior impecunity is a matter of weight and not a matter of admissibility", *Id.* at 39.

Thus, there was ample circumstantial evidence that the stolen mail parcels contained money and that the subsequent possessions and expenditures of large amounts of cash was properly admitted into evidence. Additionally, as noted above, the defendant could have, and did attempt to, rebut the Government's proof through the introduction of documentary evidence without testifying.

POINT III

The Testimony Of Anthony Short Was Properly Admitted Into Evidence.

Finally, appellant urges that the testimony of Anthony Short, the witness who reported the scheme to the authorities, should have been excluded.* This argument is wholly without merit and should be summarily rejected.

The testimony of Short and his recorded telephone conversation with appellant Walker ** were admissible under Rule 401, Fed. R. Evid., as relevant evidence of the crime charged. This evidence proved that Walker had sought to induce Short to join the conspiracy that he was forming to steal a mail bag from the Registry Section of the AMF. At or about the same time that Walker was attempting to recruit Short to take the mail bag from the AMF and deliver it to Walker at a prearranged location outside the Airport, he was also seeking to induce Helton to prepare a bag of registered mail outside the AMF for Walker to deliver to Short. In his

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* This argument was advanced both prior to trial and at the close and was rejected each time by Judge Weinstein. (T. 7-11, 510).

** This transcript is included in the Government's Supplemental Appendix (A. 1-9).

conversation with Short, Walker, in essence, provided a verbal blueprint of the crime he intended to commit and indeed did commit only three weeks later. Moreover, as proven by the accomplice testimony, the details of the theft, the motive for its completion, namely money, and the ways and means of avoiding being discovered and apprehended, were almost precisely the same as that outlined by Walker to Short.

To claim, as appellant does that this conversation was not related to the charges specified in the indictment is disingenuous and ignores the obvious. Similarly, appellant's alternative argument that under Rule 404(b), Fed. R. Evid. the Short testimony was inadmissible as a prior similar act is patently frivolous. *United States* v. *Magnano*, 543 F.2d 431 (2d Cir. 1976).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 10, 1977

Respectfully submitted,

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Eastern District of New York.

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*Of Counsel.**

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* The United States Attorney wishes to acknowledge the assistance of James F. Hoch, a third year law student at the New York University School of Law in the preparation of this brief.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

GAVIN W. SCOTTI being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of June 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

SAXE, BACON & BOLIN P.C. 39 EAST 68th STREET, NEW YORK, NEW YORK

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Gavin W. Scotti

Sworn to before me this

13th day of June 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC State of New York
No. 41-4618208
Qualified in Queens County
Term expires March 30, 1979